

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**TELECARE CORPORATION d/b/a WILLOW ROCK
CENTER**

Employer

and

Case 32-RC-257141

**SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS – WEST**

Petitioner

DECISION AND ORDER

Telecare Corporation d/b/a Willow Rock Center (Employer) operates an adolescent psychiatric care facility in San Leandro, California. The Petitioner, Service Employees International Union, United Healthcare Workers – West (Petitioner or Union) currently represents a bargaining unit (existing unit) of approximately 34 employees at that facility. By this Petition, Petitioner seeks to add a voting group of nine registered nurses (registered nurses), also employed at the facility, to the existing unit by way of an *Armour-Globe* election.¹ The Employer contends that the Petition must be dismissed because the registered nurses in the voting group sought are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the Act).

A hearing officer of the National Labor Relations Board (Board) held a hearing on March 9 and 10, 2020, in this matter. Both parties made an oral argument at the conclusion of the hearing. Based on the record evidence and relevant Board cases, I find that the Employer has met its burden of establishing that the registered nurses are supervisors within the meaning of Section 2(11) of the Act.² I therefore conclude that the election sought is not appropriate, and I am dismissing the Petition.³

¹ The Employer maintains the proper title of the position at issue is “registered nurse supervisor.” Because the supervisory status of the classification is at issue, in this Decision I have referred to the classification as “registered nurse” for the sake of clarity.

² Supervisory status is the only contested issue in the instant case. The Employer and Petitioner stipulate that the registered nurses in the voting group sought share a community of interest with the existing unit. Absent my finding regarding supervisory status I would conclude, based on this stipulation and the evidence in the record supporting it, that the petitioned-for election would be appropriate consistent with *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

³ The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The campus where the workplace is located is home to both Willow Rock Center (the Employer's facility), operated by the Employer, and Seneca Center, operated by a separate and unrelated entity. Both are adolescent psychiatric care facilities for high risk individuals but serve different roles. Seneca Center is a 16-bed adolescent psychiatric hospital for involuntary 72-hour holds put in place by medical practitioners, law enforcement, and others with the ability to order such care for those that are "suicidal, homicidal, or gravely disabled." The Employer's facility is an adolescent psychiatric treatment center, tailored to slightly longer care, with patients typically staying at the facility for five to seven days. Ninety percent of patients at the Employer's facility have been discharged from Seneca Center, with only a small portion coming from any other location, typically the local juvenile justice center. The patient care areas of Seneca House and the Employer's facility are separate, but they do share office space on the campus.

The Employer's facility consists of patient rooms and common areas. Patients typically go to their rooms for sleeping, eating, and hygiene activities, and spend time in common areas when watching television, participating in directed activities, and meeting with care providers. All patient areas of the facility are locked, and patient movement throughout the facility is controlled. Patients at the facility are regularly observed by staff. At a minimum, a patient must be observed once every 15 minutes, but a patient can also be designated as "line-of-sight," constantly within the line-of-sight of a staff member, or "one-on-one," where a staff member must always be within an arm's length.

Employees at the Employer's facility are scheduled on three shifts to cover its 24-hour operation; a night shift from 11:00 p.m. to 7:30 a.m., a day shift from 7:00 a.m. to 3:00 p.m., and a p.m. shift from 3:00 p.m. to 11:00 p.m. The Employer utilizes full-time and on-call registered nurses, with the voting group consisting of four full-time and five on-call registered nurses. Full-time registered nurses work 32 hours a week, consisting of four eight-hour shifts. The full-time nurses have set schedules and the on-call nurses are scheduled as needed.

The existing unit consists of employees in the social worker, adolescent counselor, licensed vocational nurse, licensed psychiatric technician, rehabilitation therapist, medical records coordinator, and maintenance techs/housekeeper classifications. The existing unit was certified on February 27, 2020, following a Board election.

The Employer's patient care functions are organized into essentially two departments: nursing and social services. The head of nursing is the director of nursing, and the head of social services is the clinical director, both of whom report to the facility administrator, the senior manager at the facility. At issue in this case is the nursing portion of the Employer's operation, with the Employer contending several classifications in the existing unit – licensed vocational nurses, licensed psychiatric technicians, and adolescent counselors – report to the registered nurses as the front-line supervisors in that department.

BURDEN OF PROOF AND THE BOARD'S STANDARD FOR ESTABLISHING SUPERVISORY STATUS

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). The burden of establishing supervisory status rests on the party asserting that status. *Id.*

Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

APPLICATION OF BOARD LAW TO THE FACTS OF THIS CASE

The Employer contends the registered nurses are statutory supervisors, based on their authority to assign, responsibly direct, and/or adjust the grievances of the licensed vocational nurses, licensed psychiatric technicians, and adolescent counselors. The record evidence and legal standards relevant to each are addressed in turn below.

The Authority to Assign Work

1. Record Evidence

Licensed vocational nurses assist physicians and implement their orders, including dispensing prescribed medication.⁴ They also perform paperwork related to admissions and discharges. Adolescent counselors are responsible for monitoring and documenting the status of patients, assisting other employees, and tasks such as serving meals. A single adolescent counselor, typically the same employee, acts as a “unit clerk,” with specific responsibilities related to stocking and resupplying the facility. Registered nurses complete admission and discharge paperwork, conduct nursing assessments, and perform the duties at issue in this case and described more fully in the following sections. The licensed vocational nurses, adolescent counselors, and registered nurses discussed here spend most of their time on the floor of the facility, in proximity to each other and the patients.

a. Shift Assignment Tool

At the beginning of each shift, the registered nurse completes a shift assignment tool document. This document contains a table that identifies the employees scheduled for the shift by classification, displayed on the horizontal axis (“RN,” “LVN,” “AC #1,” “AC #2,” for example). The vertical axis breaks the shift into blocks of time. The rest of the table contains employees’ duties, corresponding to a time and classification. For example, referring to the planning tool for a day shift on a Tuesday, one can cross-reference the “AC #1” position, and the 9:15-10:15 time period, and determine that that employee will be assisting patients with schoolwork.⁵ Employees in the same classification have some identical duties simply performed at different times, for example both the “AC #1” and “AC #2” positions regularly observe patients, but other duties are specific to the position.

The nature of the shift planning tool is such that the duties for each position are detailed in advance, including the time when a task will be performed. The first alleged supervisory duty performed by registered nurses is to assign the individuals working on a shift to the positions identified on the shift planning tool. Some of these do not require any determination – if a single licensed vocational nurse is scheduled, they would be placed in the single “LVN” role on the shift planning tool – but in classifications where multiple employees are scheduled, the registered nurse determines who will fill each position.

In making this decision, the registered nurse considers numerous factors, including employee experience, the particular skills of the employee, and their interactions with patients. The record contains an example of a registered nurse placing a less experienced adolescent counselor in the position where they would not be running a meeting, as this

⁴ Within the Employer’s organizational chart, licensed vocational nurses and licensed psychiatric technicians are treated as a single group. The record contains evidence almost exclusively addressing licensed vocational nurses. Accordingly, in the following sections I have only referenced licensed vocational nurses.

⁵ For the purpose of this Decision I have referred to the roles identified on the horizontal axis of the shift scheduling tool as “positions.” Accordingly, an employee’s classification is adolescent counselor, but on a given shift they could be assigned to the “AC #1,” “AC #2,” or “unit clerk” position.

duty was better suited to a more experienced employee. Another example provided was the registered nurse assigning an adolescent counselor who had not worked the prior day in the position that would require attendance at the daily clinical review meeting, as this would allow the counselor to receive an update on the current patients at the facility.

The registered nurses are not provided with detailed instructions, guidelines, or other directives on how to accomplish this assignment, but rather rely on their own judgement. The decision is made using tools such as the report from the registered nurse on the prior shift, patient notes recorded by adolescent counselors, and conversations with the individuals reporting on their shift. There is no evidence of the director of nursing or administrator changing assignments or otherwise modifying these decisions by the registered nurse.

The second portion of the shift assignment tool is assigning an employee to a set of patients, where applicable. If, for example, 11 patients are currently at the facility, and two adolescent counselors are scheduled for a shift, one adolescent counselor will be assigned 6 patients and the other 5 patients. The record demonstrates, in pairing patients with staff, a registered nurse considers similar factors to those described above: level of experience, particular skills, the patients' particular needs, and past history. The registered nurse also considers factors such as workload and patient areas of interest.

Specific examples are provided in the record, such as a registered nurse assigning an adolescent counselor with a demonstrated ability working with autistic adolescents to an autistic patient. Other examples include assigning a patient scheduled for discharge to an adolescent counselor with fewer patients or fewer overall duties because patient discharge is a time-consuming task. The record also contains of an example of a registered nurse assigning a patient with an interest in mixed martial arts to an adolescent counselor with knowledge of mixed martial arts, on the basis this may provide for an opportunity for the adolescent counselor to connect with the patient.

The registered nurse on duty can also have reporting employees deviate from the shift planning tool if necessary. The example provided in the record was a patient that was going to receive difficult news that upon discharge they were not going home as expected, but were instead going to a different facility out of state. Knowing that an adolescent counselor had a good relationship with the patient, the registered nurse adjusted the duties contained in the shift planning tool so the adolescent counselor could attend the patient's family meeting.

After assignments are made, registered nurses also verify that the adolescent counselors are performing their assigned duties. Adolescent counselors chart their patient observations at least once every 15 minutes. Once per shift, registered nurses perform rounds and verify that all charting is up to date. There is no evidence that a registered nurse would issue discipline for the failure to perform charting correctly, but the record does reflect that a registered nurse who identifies a charting error will bring it to the attention of the employee in question and have it corrected. There is also evidence registered nurses monitor break times and speak to employees about the need to return to the floor if a break

runs past its allotted time. However, there is no contention the registered nurse disciplines any employee.

b. Staffing and overtime

A registered nurse may also have to adjust duties based on unexpected circumstances during a shift. An example provided was an adolescent counselor being injured on the job and leaving to receive medical attention. In these circumstances, the registered nurse decides who will step into the position vacated and perform those duties, including calling in additional staff. While the registered nurse would notify management of an incident like a workplace injury, prior approval by management is not necessary to call in additional staff or redistribute duties.⁶

The registered nurse on duty can also call in extra staff in the event of other unexpected needs. An example is admitting a patient that requires one-to-one observation. Because these orders require the patient to be constantly observed, whereas adolescent counselors usually observe and chart a patient's activities once every 15 minutes, the adolescent counselor assigned to that one-to-one patient is effectively unable to perform any other duties. In such instances, the registered nurse has the authority to call in additional staff without obtaining prior approval.

Registered nurses, licensed vocational nurses, and adolescent counselors are hourly employees that are eligible for time-and-a-half overtime. When registered nurses call in additional employees it is entirely possible the employee reporting will incur overtime. The record reflects this has happened, and without the registered nurse obtaining prior approval from the director of nursing or any other manager. The record includes a specific example of a registered nurse having a licensed vocational nurse work a double shift, resulting in overtime for the licensed vocational nurse, and the director of nursing was simply informed after the fact. At hearing it was estimated that about half of the overtime that does occur is approved by registered nurses in this manner, with the director of nursing approving the other half.

2. Relevant Caselaw and Discussion

In the Section 2(11) context, "assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee," but "significant overall duties" do not include "ad hoc instructions to perform discrete tasks." *Oakwood Healthcare*, 348 NLRB at 689. While distributing working assignments to equalize work among employees' well known skills is considered a routine function not requiring the exercise of independent judgment, in a health care setting, assigning patients to specific caregivers has been found to require the use of independent judgment, where the purported supervisor "balances individualized condition and needs of a patient against the skills or special training of available nursing personnel," or where an employees' "skill set and level of proficiency at performing certain

⁶ Management would typically not be on-site on evenings, nights, and weekends. Management rotates an on-call role, and at these times if a serious incident occurred the registered nurse would notify the manager on call.

tasks” is tailored to a particular patient. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 4, citing *Oakwood* at 689, 693, 695.

The assignment of work in the instant case closely mirrors the situation present in the Board’s recent decision in *The Arc of South Norfolk*, cited above and by the Employer, a case involving an employer’s facility for individuals with developmental and intellectual disabilities. There, the Board concluded that the Employer’s program coordinators, in assigning clients to case managers, considered factors such as experience of the case manager, which case manager might have the best relationship with that client going forward, or whether the client and case manager were having difficulty working together. *Id.*, slip op. at 2. In addressing how program coordinators exercise independent judgment, the Board took particular notice of how clients were not simply assigned to the next case manager available or the case manager with the smallest caseload, but instead the program coordinators made an evaluation of the best fit. *Id.*, slip op at 4.

The decisions made by the registered nurses in the instant case carry at least this level of independent judgement. Not only are the registered nurses making assessments regarding patients and adolescent counselors, but they also assign individuals to the positions on the shift planning tool, and have significant discretion in adjusting duties, including calling in additional staff. Based on the record evidence of their duties, I conclude the registered nurses assign work to the licensed vocational nurses and adolescent counselors consistent with Section 2(11).

The Authority to Responsibly Direct

1. Record Evidence

The Employer maintains that the responsible direction of the registered nurses is demonstrated in two ways: the registered nurses can be disciplined for the failures or omissions of the employees reporting to them, and the registered nurses are rated on their supervisory skills in their yearly evaluations. In short, registered nurses are held accountable for the actions of the employees reporting to them, whether good or bad.

The Employer elicited from its witnesses at hearing that registered nurses “could” be disciplined for a variety of failures by the staff that report to them, but the record does not contain any documentary evidence of this type of discipline. The record does contain evidence of registered nurses reporting to the director of nursing problems involving licensed vocational nurses and adolescent counselors, but there is no evidence this reporting resulted in any discipline for the registered nurse.⁷ Similarly, the record contains communication from the director of nursing to a registered nurse that a set of employees should be reminded about taking breaks of a proper length. The registered nurse replied that this was done, but there is no evidence that the registered nurse was disciplined for the

⁷ The Employer does not argue that the reporting constituted effectively recommending discipline and based on the record evidence I have not analyzed the communications in this manner. It is not clear any employee was disciplined, or if so, how that process took place.

underlying issue. However, the record does contain discipline of a registered nurse for several reasons, including poor communication and poor performance.

The record also contains multiple evaluations of registered nurses that the Employer maintains demonstrate registered nurses being evaluated on their supervisory skills. The evaluations reference the registered nurses acting as a supervisor – one states “[the registered nurse] has transitioned well into his role as the full-time night supervisor” – but the evaluations do not contain a portion specifically dedicated to supervision. Many of the areas highlighted by the Employer focus on issues such as communication that are critical in supervision but are also important in the workplace in general.

2. Relevant Caselaw and Discussion

The Board has defined “responsibly to direct” as: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’... and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 691. The Board explained that direction is “responsible” when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692.

The present case does not contain the evidence of accountability that is the crux of a responsible direction finding. Some of the record evidence of registered nurses assigning work to the licensed practical nurses and adolescent counselors could be argued as demonstrating “direction,” but absent evidence of accountability this is a poor fit, particularly when the evidence is sufficient to establish the authority to assign. To the extent the Employer argues the registered nurses “could” have been disciplined if the licensed practical nurses and adolescent counselors did not comply with their assignments (and problems subsequently occurred), this is too speculative or, to the extent the Employer’s witnesses claim this actually happened, lacks sufficient detail. The Board has held “mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The record evidence of disciplinary actions issued to a registered nurse similarly do not demonstrate accountability. This discipline was issued to the registered nurse because of the poor performance of that disciplined employee, not those reporting to that registered nurse. While the issues highlighted, such as poor communication, could be issues that would cause problems in a supervisory context, they could just as equally be issues in other employment settings.

Petitioner cites to *Golden Crest*, *supra*, and *Loyalhanna Healthcare*, 352 NLRB 863 (2008) for the proposition that “paper authority” is insufficient for an employer to meet its burden. I agree, and in this regard my findings are consistent with Petitioner’s argument and the cases it cites. *Golden Crest* and *Loyalhanna* specifically addressed how a job description alone, with language that suggested possible accountability for the mistakes of

others, was insufficient to establish responsible direction. *Golden Crest* at 731, *Loyalhanna Healthcare* at 864.⁸

However, while I agree with this narrow point, to the extent Petitioner argues all of the evidence introduced by the Employer reflects “paper authority” because it is documentary evidence, I do not agree that *Golden Crest* and *Loyalhanna* stand for this proposition. As I have described above in the “Authority to Assign Work” section, where I did find the Employer met its burden, the record evidence consists of both documentary evidence and testimony detailing specific examples of assignment authority held and utilized in practice.

Overall, based on the foregoing and the record as a whole, I find the evidence of responsible direction alone would not be enough to meet the Employer’s burden of demonstrating supervisory status under Section 2(11).

The Authority to Adjust Grievances

1. Record Evidence

The Employer points to a specific incident as evidence of the ability of a registered nurse to adjust grievances. In this instance, a treatment plan was developed that allowed for the patient to have a ballpoint pen in their possession. The adolescent counselor assigned to the patient did not agree with this and shared with the registered nurse that, in their assessment, this was not safe. The registered nurse took this viewpoint to the treatment team, consisting of the registered nurse, clinical director, therapists and the patient’s doctor. In this instance, the registered nurse agreed with the assessment that the pen was unsafe, and the treatment plan was modified to allow the patient to use a pen under supervision only.

2. Relevant Caselaw and Discussion

The Board has traditionally held that in order to meet the “adjust grievances” criteria the evidence must show the purported supervisor is resolving more than minor disputes between employees or minor issues such as equalizing workload and break conflicts. *Ken-Crest Services*, 335 NLRB 777 (2001); *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997). Although participation in a formal grievance/arbitration process created by a collective bargaining agreement is not a necessity to find a supervisor adjusts grievances, it is the typical context. See *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *Illinois Veterans Home at Anna, L.P.*, 323 NLRB 890, 891 (1997).

Here, the Employer does not maintain the registered nurse involved in the pen situation was participating in a grievance/arbitration process. Rather, the Employer contends the adolescent counselor was bringing a concern to their supervisor and the

⁸ Petitioner also refers to two Regional Director decisions, *Crestwood Healthcare Center LLC*, 14-RC-159644 and *Professional Med Team Inc.*, 7-RC-68255. However, these decisions were not reviewed by the Board and therefore have no precedential value. See *Boeing Co.*, 337 NLRB 152, 153, fn. 4 (2001).

registered nurse, as the supervisor, resolved the situation. The evidence makes clear this was a serious issue, involving the physical safety of the patient, other patients, staff, or visitors, and that the treatment plan was modified. This was not a minor squabble or inconvenience. Further, there appears to be no issue that the registered nurse used independent judgement in addressing the situation; it was the registered nurse that decided to take the issue to the treatment team and seek a revision in the treatment plan.

Ultimately, I am not inclined to find this example demonstrates the registered nurse adjusted a grievance because it is unknown in what context the issue was raised. The danger presented by the pen could have been raised as a workplace safety issue, but it could just as easily have been raised out of concern for the patient's own well-being. The record contains no other evidence regarding treatment teams, treatment plans and various employees' responsibilities in a situation like this. Although it is *possible* that the registered nurse was resolving a workplace complaint or issue when the treatment plan was modified, I am not willing to conclude the record as a whole supports this conclusion.

Accordingly, I find the record evidence regarding this one incident is not sufficient to meet the Employer's burden of demonstrating supervisory status under Section 2(11).

Evidence of Secondary Supervisory Indicia

In addition to the primary indicia addressed above, the record also reflects registered nurses are paid an hourly rate significantly higher than the licensed vocational nurses and adolescent counselors. While not sufficient to carry the Employer's burden, I do find it supports finding supervisory status as a secondary factor. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002).

CONCLUSION

Because the evidence establishes registered nurses have the authority to assign duties to the licensed vocational nurses and adolescent counselors, I conclude that the Employer has met its burden of establishing the registered nurses in the voting group sought are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I have dismissed the instant petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by April 17, 2020.

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A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Oakland, California this 3rd day of April 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
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